

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARK MARLOW and NANCY
MARLOW, husband and wife,

Plaintiffs,

V.

JOHN HOTCHKISS, in his individual capacity; STEVEN M. CLEM, in his individual capacity; ANDREW L. KOTTKAMP, in his individual capacity; KAREN M. URELIUS, in her individual capacity; GLEN A. DE VREIS, in his individual capacity; JERRY J. GREGORY, in his individual capacity; RAMON PEREZ, in his individual capacity; ANTHONY O. WRIGHT, in his individual capacity; ERIC PENTICO, in his individual capacity; GARY GRAFF, in his individual capacity; BRUCE A. ESTOK, in his individual capacity; F. DALE BAMBRICK, in his individual capacity; MARK D. KULASS, in his individual capacity; DALE L. SNYDER, in his individual capacity; KEN STANTON, in his individual capacity; STEVEN JENKINS, in his

NO: 2:15-CV-0131-TOR

ORDER ON DEFENDANTS' MOTIONS TO DISMISS

individual capacity; and DOES 1 through 10, inclusively in their individual capacity.

Defendants.

BEFORE THE COURT are Defendants Eric Pentico and Gary Graff's Motion to Dismiss or in the Alternative for Summary Judgment (ECF No. 40), Defendants F. Dale Bambrick, Bruce Estok, Jerald Gregory, Karen Urelius, and Anthony Wright's ("Federal Employee Defendants") Motion to Dismiss (ECF No. 44), Defendants John Hotchkiss, Steven M. Clem, Andrew Kottkamp, Glen A. Devries, Ramon Perez, Mark Kulaas, Dale Snyder, Steven Jenkins and Ken Stanton's ("Douglas County Defendants") Motion to Dismiss (ECF No. 45). These matters were submitted without oral argument. Defendants Pentico and Graff are represented by Carl P. Warring. The Federal Employee Defendants are represented by Vanessa R. Waldref. The Douglas County Defendants are represented by Heather C. Yakely. Plaintiffs Mark and Nancy Marlow are proceeding *pro se*.

The Court has reviewed the briefing, the record and files therein, and is fully
nied.

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1 BACKGROUND

2 On May 14, 2015, Plaintiffs filed a Complaint in this Court alleging
3 constitutional violations related to zoning and permitting issues concerning
4 Plaintiffs' real property in Douglas County, Washington. ECF No. 1. Specifically,
5 Plaintiffs allege the following causes of action: (1) "Breach of the Covenant of
6 Good Faith and Fair Dealing;" (2) "Violation of Past Subject Matter Jurisdictional
7 Challenge Violations;" (3) "Fourth Amendment Expectation of Privacy Violations
8 and Probable Cause Violations;" (4) "Violation of Fifth Amendment Due Process;"
9 (5) "Violation of the Forever Benefits of a Specific United States Land Patent;" *Id.*
10 at 18-22, (6) Action for a Quiet Title Against All Named Defendants; and (7)
11 Declaratory Relief. *Id.* at 1. Plaintiffs also allege damages in the amount of
12 \$1,500,000. *Id.* at 23.

13 In the Complaint caption Plaintiffs assert they are suing each Defendant in
14 their individual capacity. *Id.* at 1. Defendant Graff is a Professional Wetland
15 Scientist who works for the Washington State Department of Ecology, and
16 Defendant Pentico is an Area Habitat Biologist who works for the Washington
17 State Department of Fish and Wildlife. ECF No. 40 at 7. All of the Federal
18 Employee Defendants are employed by the United States Army Corps of Engineers
19 and National Oceanic and Atmospheric Administration. ECF No. 44 at 1-2. The
20 Douglas County Defendants are officials and employees of Douglas County, and

1 Defendant John Hotchkiss is a Douglas County Superior Court Judge and
2 Defendant Steven M. Clem is a Douglas County Prosecuting Attorney. ECF No.
3 45 at 2.

4 The Douglas County Defendants and Defendants Graff and Pentico have
5 answered the Complaint. ECF Nos. 5, 9. The Federal Employee Defendants have
6 not filed an answer, and argue that Plaintiffs have failed to properly serve the
7 Federal Employee Defendants pursuant to Federal Rule of Civil Procedure 4(i).

8 *See* ECF No. at 13-14.

9 On October 30, 2015, Defendants Pentico and Graff filed a motion to
10 dismiss for failure to state a claim or, in the alternative, for summary judgment.
11 ECF No. 40. On November 3, 2015, both the Federal Employee Defendants and
12 Douglas County Defendants filed motions to dismiss. ECF Nos. 44, 45.
13 Additionally, the Douglas County Defendants filed a joinder to adopt the Federal
14 Employee Defendants' argument that Plaintiffs' complaint does not meet the
15 requirements of FRCP 8(a)(2). ECF No. 46 (citing ECF No. 44 at 12-13).

16 Plaintiffs filed responses in opposition to each motion to dismiss. ECF Nos.
17 48, 49, 50. The Federal Employee Defendants and Douglas County Defendants
18 filed respective replies. ECF No. 52, 53. Defendants Pentico and Graff filed a
19 notice to the Court and parties that they will not file a reply and rely on their
20 original briefings. ECF No. 51.

FACTS

2 On June 3, 1997, Plaintiffs purchased shoreline property on the Columbia
3 River in Douglas County, Washington. ECF No. 1 at 36. Shortly thereafter,
4 Plaintiffs allege Mrs. Marlow “made a call to Douglas County to ask if permits
5 were required to cap an existing boat launch and pour other concrete on the
6 property.” *Id.* Plaintiffs “believe” Mrs. Marlow spoke to Douglas County
7 employee Roberta Jackson, who allegedly gave Mrs. Marlow the “verbal okay for
8 concrete work” and told her permits were not required for “flat work.” *Id.*
9 Sometime thereafter, Plaintiffs made unpermitted improvements to their property.
10 Plaintiffs allege various Douglas County employees visited their property in 1999,
11 2003, and 2005 to assess multiple permit applications for other structures on their
12 property and “showed zero concern that the [unpermitted improvements] were in
13 any violation.” *Id.*

14 On October 27, 2010, Plaintiffs allege they were contacted by Defendant
15 Perez to “speak unofficially about our alleged violations” concerning the
16 unpermitted improvements. *Id.* at 37. In January of 2011, Plaintiffs claim they
17 received their “first formal letter from the county” instructing them formal
18 enforcement proceedings may be taken against them for the unpermitted
19 improvements. *Id.*

1 Sometime in 2011,¹ Plaintiffs' claim their case was reviewed by a Douglas
2 County Hearing Examiner. *Id.* Plaintiffs do not provide the details of the Hearing
3 Examiner's decision, but the Court presumes the outcome was unfavorable for
4 Plaintiffs as they filed an appeal with the Douglas County Superior Court. *See id.*
5 at 6-7. Similarly, Plaintiffs do not set forth the dates and details regarding the
6 appeal, but dispute the jurisdiction of the Douglas County Superior Court over this
7 matter and claim its decision is "null and void" *See ECF No. 1 at 7, 8.*

8 On May 14, 2015, Plaintiffs initiated this action. *See ECF No. 1.* In the
9 Complaint, Plaintiffs assert "sovereign" title to their Douglas County Property, *id.*
10 at 14-16, and claim the "named Co-Defendants have for more than four years
11 attempted to enforce a retroactive ex post facto Administrative law on [Plaintiffs
12 and their property]." *Id.* at 12. The gravamen of Plaintiffs' Complaint is that their
13 property is not subject to any county, state, federal, or other, laws, and the
14 administrative and judicial proceedings enforcing the land use and permitting laws
15 against their Douglas County property were commenced without authority, and
16 therefore, have no force. *See id.* at 6-8, 14-17.

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¹ Plaintiffs do not clearly set forth the dates and details regarding this hearing, and
20 other matters.

DISCUSSION

I. Jurisdictional Bar

As a preliminary matter, Defendants Pentico and Graff argue that the Court lacks jurisdiction over Plaintiffs' claims pursuant to the *Rooker-Feldman* doctrine. ECF No. 40 at 4-5. Because the *Rooker-Feldman* doctrine concerns the scope of the Court's jurisdiction, the Court will address this issue first in order to determine if it can reach the remaining defenses raised by Defendants.

Pursuant to the *Rooker-Feldman* doctrine, “a United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgment may be had only in [the United States Supreme Court].” *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 492 (1983); *see Cooper v. Ramos*, 704 F.3d 772, 777 (9th Cir. 2012) (“The doctrine bars a district court from exercising jurisdiction not only over an action explicitly styled as a direct appeal, but also over the ‘de facto equivalent’ of such an appeal) (citation omitted). “This is true even if the challenge to a state court decision involves federal constitutional issues.” *Branson v. Nott*, 62 F.3d 287, 291 (9th Cir. 1995) (citing *Feldman*, 460 U.S. at 484-486). “The purpose of the doctrine is to protect state judgments from collateral federal attack.” *Doe & Assocs. Law Offices v. Napolitano*, 252 F.3d 1026, 1030 (9th Cir. 2001).

1 “To determine whether the *Rooker-Feldman* bar is applicable, a district court
2 first must determine whether the action contains a forbidden *de facto* appeal of a
3 state court decision.” *Bell v. City of Boise*, 709 F.3d 890, 897 (9th Cir. 2013)
4 (citing *Noel v. Hall*, 341 F.3d 1148, 1158 (9th Cir. 2003)). The Ninth Circuit has
5 explained, “[t]o determine whether an action functions as a de facto appeal, we pay
6 close attention to the *relief* sought by the federal-court plaintiff. It is a forbidden
7 de facto appeal under *Rooker-Feldman* when the plaintiff in federal district court
8 complains of a legal wrong allegedly committed by the state court, and seeks relief
9 from the judgment of that court.” *Cooper*, 704 F.3d at 777-78 (emphasis in
10 original) (internal citations and quotations omitted). If the court determines a
11 plaintiff brought a forbidden de facto appeal, and consequently, the *Rooker-*
12 *Feldman* doctrine applies, the doctrine will not only prohibit the plaintiff from
13 litigating the de facto appeal, but also any issue that is “inextricably intertwined”
14 with the state court’s judgment. *Id.* at 778-79. A claim is “inextricably
15 intertwined” with a state court judgment “if the federal claim succeeds only to the
16 extent that the state court wrongly decided the issues before it,” i.e. “[w]here
17 federal relief can only be predicated upon a conviction that the state court was
18 wrong.” *Id.* at 779. (quotation omitted); *see also Bianchi v. Rylaarsdam*, 334 F.3d
19 895, 898 (9th Cir. 2003) (providing that claims are “inextricably intertwined” with
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1 the state court's decision if "the adjudication of ... [such] claims would undercut
2 the state ruling").

3 Plaintiffs contend that they are not attempting to appeal any state court
4 decision or judgment, rather, they claim their Complaint "should be considered as
5 a brand-new Subject Matter Jurisdictional Challenge[.]" ECF No. 1 at 8.
6 Specifically, Plaintiffs assert this action is a "Jurisdictional Paradigm-Shift away
7 from all non-jurisdictional state court actions that were accomplished while in the
8 clear, total, complete, absence of all Subject Matter Jurisdiction." *Id.* at 6.

9 Plaintiffs argue that well-settled law indicates that "no Federal, State, County, City,
10 Township, Town or Village Administrative-Laws apply to Plaintiffs [] and the
11 subject Private Sovereign Land," *Id.* at 6-7, and consequently the actions of the
12 state court are "null and void." *Id.* at 8. Further, Plaintiffs accuse Defendant Judge
13 Hotchkiss of "impersonating a judicial officer who knew or reasonably should
14 have known the American Laws regarding the Sovereignty of the subject United
15 States Land Patented private land and the Sovereignty of its owners [Plaintiffs],
16 and their family." *Id.* at 7.

17 Despite Plaintiffs' argument otherwise, the Court finds this action is a de
18 facto appeal of a state court decision or judgment. Plaintiffs challenge the subject
19 matter jurisdiction of the Douglas County Superior Court over Plaintiffs'
20 permitting dispute with the County. The Superior Court rejected this argument.

1 *See id.* at 19. While Plaintiffs' argument that a court's subject matter jurisdiction
2 "can be challenged any time" has merit, *id.* at 8, Plaintiffs must follow the
3 appropriate and timely appellate processes required by Washington State Court
4 Rules. *See Noel v. Hall*, 341 F.3d 1148, 1154 (9th Cir. 2003) (stating a federal
5 district court does not have subject matter jurisdiction to hear a direct appeal
6 from a state court; the United States Supreme Court is the only federal court with
7 jurisdiction to hear such an appeal). Tellingly, while Plaintiffs' Complaint
8 includes a request for \$1.5 million in damages against all Defendants, Plaintiffs
9 also request "action for a quiet title against all named defendants" and declaratory
10 relief that the original state action lacked jurisdiction over Plaintiffs and their
11 Douglas County property due to Plaintiffs' and their property's "sovereign" status.
12 *See* ECF No. 1 at 1; 6-8. If this Court were to grant Plaintiffs the relief they seek,
13 it would necessarily involve overturning the Superior Court's judgment concerning
14 Plaintiffs' jurisdictional challenge and Plaintiffs' unpermitted improvements to
15 their Douglas County property. Thus, the Court finds *Rooker-Feldman* applies to
16 Plaintiffs' request for a declaration that the original state court action was without
17 subject matter jurisdiction (Causes of Action (2) and (7)) and "violated" Plaintiffs'
18 sovereignty over their Douglas County property (Causes of Action (5) and (7)) and
19 Plaintiffs' request for a quiet title (Cause of Action (6)). *See Cooper*, 704 F.3d at
20 777-78. Pursuant to the *Rooker-Feldman* doctrine, Plaintiffs' Causes of Action

1 (2), (5), (6) and (7) are a collateral attack on a state court's judgment and this Court
2 is without jurisdiction to hear these claims. Accordingly, these claims are
3 dismissed with prejudice.

4 Having determined that Plaintiffs' action is, at least in part, a de facto
5 appeal, the Court considers next whether any remaining claims are "inextricably
6 intertwined" with the state court decision from which the de facto appeal was
7 taken. *See Noel*, 341 F.3d at 1165.

8 Plaintiffs allege Defendants' conduct violated their Fourth Amendment right
9 to privacy and their Fifth Amendment right to due process. *See* ECF No. 1 at 20,
10 21. A claim alleging misconduct, even by a third party, may be "inextricably
11 intertwined" if the allegations were previously considered by the state court judge
12 in reaching the decision in a particular case. *See Cooper*, 704 F.3d at 782 (holding
13 plaintiff's claim that a prosecutor, senior criminalist, and other public officials had
14 falsified evidence was "inextricably intertwined" with the state court's judgment in
15 the plaintiff's cause because the state court had "found that similar and, in some
16 instances, identical allegations were insufficient"). Here, Plaintiffs' allegations
17 that their rights were violated are based on their contestation to the state court's
18 jurisdiction. *See* ECF No. 1 at 20, 21 (Plaintiffs claiming Defendants'
19 unconstitutionally "spied on and *filed unlawful fraudulent non-jurisdictional*
20 *granting Documents in the state court*" in violation of their Fourth and Fifth

1 Amendment rights) (emphasis added). The implication of Plaintiffs' claim is that
2 the alleged misconduct, the filing of documents in state court, is unconstitutional
3 because the state court did not have jurisdiction over Plaintiffs and their property.
4 These allegations were considered in the state court action when the court rejected
5 Plaintiffs' subject matter jurisdiction challenge. Therefore, the Court finds that
6 these allegations (Causes of Action (3) and (4)) are "inextricably intertwined" with
7 Plaintiffs' de facto appeal, and consequently, these claims are dismissed with
8 prejudice.

9 Similarly, in their remaining claim, Plaintiffs' allege "that the
10 *commencement of proceedings upon the private land* lawfully belonging to them...
11 was in violation of their constitutionally guaranteed and secured rights to be
12 protected by the implied Covenant of Good-Faith and Fair Dealing." ECF No. 1 at
13 18 (emphasis added). While it is unclear precisely what cause of action Plaintiffs'
14 assert,² it is clear that this claim, again, is based on Plaintiffs' subject matter
15 jurisdiction challenge. As above, this allegation is "inextricably intertwined" with
16 Plaintiffs' de facto appeal, and this Court lacks jurisdiction to hear this claim.

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² A breach of the covenant of good faith and fair dealing is a contract claim. Here,
19 Plaintiffs do not allege any facts that indicate a contract between Plaintiffs and any
20 defendant exists, nor do Plaintiffs allege such a contract exists.

1 Thus, Plaintiffs' remaining claim (Cause of Action (1)) is dismissed with
2 prejudice.

3 Accordingly, the Court finds that Plaintiffs' claims are barred by the *Rooker-*
4 *Feldman* doctrine, and Defendants' motions to dismiss are granted on this basis.
5 See *Cooper*, 704 F.3d at 777.

6 Finally, granting leave to amend the complaint would be nothing less than
7 futile. See *id.* at 783-85.

8 **ACCORDINGLY, IT IS HEREBY ORDERED:**

9 1. Defendants' Motions to Dismiss (ECF Nos. 40, 44, 45) are **GRANTED**.
10 2. Plaintiffs' claims are **DISMISSED with prejudice**.

11 The District Court Executive is hereby directed to enter this Order, enter
12 Judgment for Defendants, provide copies to counsel and Plaintiffs, and **CLOSE**
13 the file.

14 **DATED** January 14, 2016.



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16 THOMAS O. RICE
17 United States District Judge
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